

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

DONNA JOHNSON,

Plaintiff,

vs.

Jo Anne B. Barnhart¹, ACTING
COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 01-CV-4014-DEO

ORDER

Plaintiff, Donna Johnson, filed a Complaint in this Court on February 20, 2001, seeking review of the Commissioner's decision to deny her claim for Social Security benefits under Title II and Title XVI of the Social Security Act, 42 U.S.C. §§ 401 *et seq.* and 1381 *et seq.* This Court may review a final decision by the Commissioner. 42 U.S.C. §405(g). For the reasons set out herein, the decision of the Commissioner is reversed.

I. BACKGROUND

Plaintiff filed an application for Social Security Disability Benefits on September 28, 1995 claiming to be disabled since September 23, 1994 (Tr. 13). An application for Supplemental Security Income Benefits was also filed. Her

¹Jo Anne B. Barnhart became the Acting Commissioner of Social Security on November 14, 2001. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, Jo Anne B. Barnhart should be substituted for Larry G. Massanari as the defendant in this suit. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. §405(g).

applications were denied initially (Tr. 154-60) and upon reconsideration (Tr. 147-51). On March 15, 1997, following a hearing, an Administrative Law Judge (ALJ) determined that Plaintiff was not disabled through the date of the decision. Plaintiff filed a request for review by the Appeals Council (Tr. 324-36). On April 21, 1998, the Appeals Council remanded the case to the hearing level for further proceedings (Tr. 385-87). In the meantime, on April 24, 1997, Plaintiff again filed a new application under the Social Security Act alleging disability since September 23, 1994 (Tr. 416-21). Plaintiff's applications were denied initially (Tr. at 422, 432-37) and on reconsideration. (Tr. 426-31, 440-44). On December 8, 1998, a new hearing was held to address both Plaintiff's request for a hearing on her new application and to consider the Appeal's Council's remand order based on Plaintiff's prior application (Tr. 62-140). On January 13, 1999, the ALJ issued an unfavorable decision in which he found that Plaintiff was not under a "disability" during the entire period at issue, September 23, 1994 through the date of the decision (Tr. 13-28). The ALJ's decision was affirmed by the Appeals Council of the Social Security Administration on January 12, 2001 (Tr. 5-6). A complaint was filed in this Court on February 20, 2001.

In her decision, following the familiar five step sequential evaluation set out in Polaski v. Heckler, 739 F.2d 1320 (8th Cir. 1984), the ALJ, at the first step, found that Plaintiff had not engaged in substantial gainful activity after her alleged onset disability date of September 23, 1994 (Tr. 15, 26). At the

second step, the ALJ found that Plaintiff's severe impairments were: arthritic pain, fibromyalgia, adjustment disorder, depressed mood and mixed anxiety, depression, not otherwise specified, post traumatic stress disorder related to a motor vehicle accident in December 1995, and generalized anxiety disorder (Tr. 15, 26). At the third step, the ALJ found that Plaintiff's impairments do not meet or equal the criteria of a listed impairments listed in Appendix 1 to Subpart P of the Social Security Administration's Regulations No. 4. (Tr. 15, 27). At the fourth step, the ALJ found that Plaintiff was unable to perform her past relevant work as a general duty nurse, informal waitress, and as an occupational nurse (Tr. 27). At step five, the ALJ found that notwithstanding the exertional and non-exertional limitations resulting from her medically determinable impairments, the Plaintiff has the residual functional capacity for other work that exists in the regional and national economies in significant numbers (Tr. 27). The ALJ found that Plaintiff's allegations of complete disability were not credible and found that Plaintiff was not disabled nor entitled to the benefits for which she had applied (Tr. 28).

The Plaintiff and the Defendant both agree that the first four steps in the ALJ's analysis are undisputed. It is the fifth step that is in dispute - whether the Plaintiff has the residual functional capacity to perform *other* work that exists in the national economy.

II STANDARD OF REVIEW

The Eighth Circuit Court of Appeals has explained that "in

the last step, the Commissioner has the burden to establish that jobs realistically suited to the claimant's residual functional capabilities are available in the national economy." Cox v. Apfel, 160 F.3d 1203, 1207 (8th Cir. 1998) *citing* Talbott v. Bowen, 821 F.2d 511, 514-15 (8th Cir. 1997). More specifically, as explained by United States District Judge Robert W. Pratt of the Southern District of Iowa, sitting by designation:

In our circuit it is well settled law that once a claimant demonstrates that he or she is unable to do past relevant work, the burden of proof shifts to the Commissioner to prove first that the claimant retains the residual functional capacity to do other kinds of work, and second, that other work exists in substantial numbers in the national economy that the claimant is able to do. *McCoy v. Schweiker*, 683 F.2d 1138, 1146-47 (8th Cir. 1982) (*en banc*); *O'Leary v. Schweiker*, 710 F.2d 1334, 1338 (8th Cir. 1983).

Nevland v. Apfel, 204 F.3d 853, 857 (8th Cir. 2000). Furthermore, the question of whether Plaintiff has the residual functional capacity to do other work is a medical question. Id. at 868.

III. MEDICAL EVIDENCE

The medical reports that are a part of the record of this case have been carefully reviewed by this court. A summary of those reports, taken from pages 225-272; 291-348; 350-352 & 538-676 of the certified record, follows:

The record reflects that after having three motor vehicle accidents, the Plaintiff began having physical health problems,

including chronic generalized anxiety(Tr. 226-235; 547-548) and neck and lower back pain (Tr. 551). Her multiple pains were diagnosed as fibromyalgia² in late 1992 (Tr. 301 & 305) and again in 1996 (Tr. 553 & 557). Following her termination of employment from John Morrel³ in September, 1994, she began seeing a mental health professional (Tr. 236-37). In December 1995, Plaintiff was injured in her third motor vehicle accident, a head-on collision (Tr. 243). In early 1996, after moving to a different community, she began psychotherapy with Dr. Elizabeth Larson, Ed.D., at Plains Area Mental Health (Tr. 562). About a year later she was evaluated by psychiatrist Dr. Mathew Stanley, D.O. (Tr. 578-581). Dr. Stanley diagnosed Plaintiff with panic disorder with agoraphobia⁴, generalized anxiety disorder and depression (Tr. 581). He also rated her global assessment of functioning at 55 (Tr. 581). In December 1996, Plaintiff saw Dr. Shawn T. Nesbo, M.D., at the Hawarden Medical Clinic. He diagnosed her with fibromyalgia, chronic generalized anxiety,

²Fibromyalgia: a disease that manifests itself by a chronic fatigue and pain/ache in the joints and muscles, usually caused by some type of trauma.

³The record indicates that John Morrel contends she quit her job after walking out during a meeting, and the Plaintiff contends she was fired. The first ALJ who handled her case accepted the employer's version (Tr. 52).

⁴Agoraphobia: a mental disorder characterized by an irrational fear of leaving the familiar setting of home, or venturing into the open, so pervasive that a large number of external life situations are entered into reluctantly or are avoided; often associated with panic attacks. Stedman's Medical Dictionary.

major depression, chronic pain syndrome, and found that she had a history of panic attacks (Tr. 595). Dr. Nesbo referred her to Dr. William O. Samuelson, M.D., for orthopedic evaluation (Tr. 616). Dr. Samuelson diagnosed her with degenerative disc disease of the cervical spine, with cervical stenosis and referred her for physical therapy (Tr. 616). For a while she was primarily treated by Dr. Cynthia K. Wolff, M.D., who later referred her to the University of Iowa Hospitals and Clinic for more extensive neurology and rheumatology work. Following a July 1996 evaluation, Dr. Sue Barcellos, M.D., Assistant Professor of Neurology, stated that "[t]here was at no point evidence of her embellishing..." (Tr. 271).

In early 1997, evaluations by Neurologist Dr. Thomas J. Clark, D.O., concluded that Plaintiff suffered chronic pain syndrome secondary to fibromyalgia, multiple traumatic injuries, herniated nucleus propulsus C4-5, and hyperreflexia (Tr. 572). At about the same time, evaluations by a cardiovascular and internal medicine specialist, Dr. Leslie Hershkowitz, M.D., F.A.C.C., noted scoliosis, and concluded that the MRI results from Johnson's herniated and bulging discs may explain her chest pain, hand pain and lower back pain (Tr. 582). He also noted a small heart and diagnosed symptomatic premature atrial beats (Tr. 584). X-rays also revealed mild emphysema and scarring of the lungs (Tr. 586) consistent with the CT scan results which showed obstructive pulmonary disease (Tr. 597).

Further examinations were done by Dr. Frederick Entwhistle, M.D., Plaintiff's examining physician who gave an expert opinion

regarding Plaintiff's functional limitations and capacities (Tr. 555-561). Plaintiff's counselor, Mr. James Anderson, opined that she suffers from depression and severe panic attacks, as well as diminished physical ability since her last car accident (Tr. 39). Mr. Anderson's associate, consulting psychologist Dr. Michael Baker also provided an opinion as to Plaintiff's mental health, concluding that Plaintiff suffers from anxiety disorder and considerable depressive symptoms (Tr. 352). With regard to Plaintiff's physical complaints, Dr. Baker concluded that they do not seem to be related to or histrionic to her personality characteristics "but more likely related to actual chronic medical problems and injuries" (Tr. 352).

IV. DISCUSSION

The scope of this Court's review is whether the decision of the Secretary in denying disability benefits is supported by substantial evidence on the record as a whole. 42 U.S.C. §405(g). See *Lorenzen v. Chater*, 71 F.3d 316, 318 (8th Cir. 1995). Substantial evidence is less than a preponderance, but enough so that a reasonable mind might accept it as adequate to support its conclusion. *Pickney v. Chater*, 71 F.3d 294, 296 (8th Cir. 1996). We must consider both evidence that supports the Secretary's decision and that which detracts from it, but the denial of benefits shall not be overturned merely because substantial evidence exists in the record to support a contrary decision. *Johnson v. Chater*, 87 F.3d 1015, 1017 (8th Cir. 1996) (citations omitted). When evaluating contradictory evidence, if two inconsistent positions are possible and one represents the Secretary's

findings, this Court must affirm. *Orrick v. Sullivan*, 966 F.2d 368, 371 (8th Cir. 1992) (citation omitted).

Fenton v. Apfel, 149 F.3d 907, 910-11 (8th Cir. 1998).

In short, a reviewing court should neither consider a claim de novo, nor abdicate its function to carefully analyze the entire record. *Wilcutts v. Apfel*, 143 F.3d 1134, 1136-37 (8th Cir. 1998) citing *Brinker v. Weinberger*, 522 F.2d 13, 16 (8th Cir. 1997).

As stated above, the question of whether Plaintiff has the residual functional capacity to do other work is a medical question. *Nevland v. Apfel*, 204 F.3d 853, 868 (8th Cir. 2000). The ALJ should also evaluate the Plaintiff's credibility. (SSR 96-7p; Tr. 17-18) And most importantly, at the fifth step, the burden shifts to the Commissioner to prove that the Plaintiff could do other work. See *Nevland v. Apfel*, 204 F.3d 853, 857 (8th Cir. 2000).

A. Medical Evidence

This Court is persuaded that the ALJ failed to give the appropriate weight to the medical evidence which clearly supports the conclusion that the Plaintiff is disabled. The ALJ did not give enough credit to James F. Anderson, the social worker who testified about providing individual therapy to the Plaintiff. The fact that the Plaintiff "had not seen him during the last couple of years" as stated by the ALJ (Tr. 19), is not a sufficient reason for discrediting his opinions, and neither is the fact that he is not a doctor. Mr. Anderson provided therapy to the Plaintiff approximately 60 times. The ALJ also discredits

Dr. Michael Baker's report because he was not a treating source but merely a psychologist in the same office as Mr. Anderson, the social worker (Tr. 20). This Court is persuaded that although Dr. Baker only examined the Plaintiff on one occasion for approximately two and a half hours (Tr. 343), his evaluation, in conjunction with Mr. Anderson's numerous evaluations, should have been given at least as much weight as the opinions of the Commissioner's examining psychologist, Dr. McMeekin, who only examined the Plaintiff one time.

The ALJ also erred in wrongfully discounting the opinions of Plaintiff's examining physician Dr. Fredrick Entwhistle. Dr. Entwhistle did an extensive analysis of the Plaintiff and reported that if Plaintiff had a sedentary job she would have to have her legs elevated at hip height 20% of the time and would have to take unscheduled breaks every thirty (30) minutes (Tr. 312, 317). He said she would likely be able to sit, stand and walk for less than two (2) hours (Tr. 317), and she would only be able to continuously sit and stand for thirty minutes at a time (Tr. 311). He reported that she has daily pain which interfered with her daily activities (Tr. 310). He reported that Plaintiff has significant limitations in repetitive reaching, handling and fingering (Tr. 312) and cannot bend or twist at the waist at all during an 8 hour working day (Tr. 313). She has guarding and tightness in her muscles (Tr. 314). Dr. Entwhistle concluded that Plaintiff meets the American Rheumatological criteria for fibromyalgia and his prognosis of her was "guarded to poor" (Tr. 311). He also concluded that Plaintiff is not a malingerer (Tr.

310, 315).

The ALJ herself pointed out that sedentary work requires that an individual be able to sit for approximately six (6) hours out of an eight hour work day (Tr. 25). The vocational expert testified that Plaintiff has the residual functional capacity to occasionally lift and carry twenty pounds; frequently lift and carry ten pounds; stand and walk for a total of about six hours in an eight hour workday; and sit for a total of six hours in an eight hour workday. (Tr. 25). The vocational expert went on to state that Plaintiff could perform the following light occupations: assembler, marker or labeler, and inspector or hand packager. The ALJ never explained how the vocational expert could conclude that Plaintiff could sit, stand and walk for six hours when Plaintiff's examining physician, Dr. Entwistle, concluded that she could only do these things for two hours.

In her analysis, the ALJ failed to mention the evaluations performed by Neurologist Dr. Thomas J. Clark, D.O., who, as mentioned above, concluded that Johnson suffered chronic pain syndrome secondary to fibromyalgia, multiple traumatic injuries, herniated nucleus propulsis C4-5, and hyperreflexia (Tr. 572). The ALJ also failed to mention the evaluation performed by cardiovascular and internal medicine specialist, Dr. Leslie Hershkowitz, M.D., F.A.C.C., who, as mentioned above, noted scoliosis, and concluded that the MRI results from Plaintiff's herniated and bulging discs may explain her chest pain, hand pain and lower back pain (Tr. 582). Dr. Hershkowitz also noted a small heart and diagnosed symptomatic premature atrial beats (Tr.

584), as well as mild emphysema and scarring of the lungs (Tr. 586) consistent with the CT scan results which showed obstructive pulmonary disease (Tr. 597).

The ALJ also erred in her assessment of Plaintiff's treating psychiatrist Dr. Mathew Stanley, D.O., who as stated above, diagnosed the Plaintiff with panic disorder and agoraphobia, generalized anxiety disorder and depression (Tr. 581). The ALJ did not really give any credit to Dr. Stanley's conclusions, but instead zeroed in on a remark made by Dr. Stanley where he stated that Plaintiff is waiting to see how her legal situation turns out (Tr. 20). (The Plaintiff's pending legal matters is discussed below under "Plaintiff's Credibility.") The fact is, that the ALJ was sidetracked in its analysis of Dr. Stanley's conclusions and did not give his conclusions the appropriate weight they deserve.

B. Plaintiff's Credibility

In assessing the plaintiff's credibility, the ALJ focused on her testimony at the December 8, 1998 hearing where she stated that she tried to limit her activities to avoid pain yet she also stated she needs a job that would allow her to move around a lot (Tr. 23, 103). The ALJ found this testimony to be inconsistent (Tr. 23). However, this Court is persuaded that the ALJ failed to see these comments in the context of the whole picture. On cross examination, the Plaintiff explained:

I do things like, for 10 minutes I might do something, and then sit for a while, and then I might do something else, maybe an hour or so later. I do it in little shifts because if I do it repetitively or for any length of

time then I have a lot of pain and I'm trying to avoid having pain.

This Court does not find the Plaintiff's comments to be inconsistent. The Plaintiff clearly has problems staying in one position for long periods of time and she must be able to move around a lot to adjust herself to avoid and diminish her pain.

Furthermore, as stated above, the ALJ commented on Dr. Mathew Stanley's progress notes of April 18, 1997, and stated that Plaintiff's motivation or lack thereof may have been influenced by her pending litigation. At the hearing held before this Court, both parties here agreed that the "pending litigation issue" is not an issue that should have been considered by the ALJ and should not be considered by this Court at this time.

This Court is not persuaded that Plaintiff lacks credibility. The ALJ failed to show how the Commissioner has proven that the Plaintiff lacks credibility. Furthermore, the ALJ did not take into account the fact that plaintiff is a high school graduate with three years post high school education in the United States Navy (Tr. 483-84) and that in the past she also worked as a waitress and nurse (Tr. 537). Prior to her physical problems, the Plaintiff had a solid work record. There is no evidence that she ducked work or is trying to do so now. The ALJ failed to take her solid work record into account when assessing her credibility. Even putting Plaintiff's credibility aside, there is an abundance of credible medical evidence to support her subjective complaints of pain.

This Court is persuaded that the ALJ's decision is not supported by substantial evidence in the record as a whole. The

medical evidence supports the conclusion that the Plaintiff is disabled, and it clearly establishes that she does not have the residual functional capacity to do any other work in the national economy.

V. DATE OF DISABILITY ONSET

In her application for disability benefits, the Plaintiff alleges a disability onset date of September 23, 1994 (Tr. 13). The ALJ stated that "[t]he lack of objective medical evidence of disability since September 23, 1994 undermines Ms. Johnson's allegation that she has been completely disabled since that date." This statement has merit and this Court is therefore persuaded that prior to 1997, Plaintiff's physical problems, although they may have been serious, were not made as clear, nor were they medically supported as well as they are by the examinations and reports of Dr. Clark, Dr. Hershkowitz, Dr. Stanley and Dr. Entwhistle. Therefore, this Court concludes that the Plaintiff is disabled as of March 21, 1997.

VI. CONCLUSION

This Court holds that the Commissioner's⁵ decision is not supported by substantial evidence in the record as a whole. The medical evidence establishes that Plaintiff does not have the residual functional capacity to do any other work in the national economy. A reversal with an award of benefits as of **March 21, 1997** is the appropriate remedy.

⁵The Plaintiff prays for relief as against the action of the Commissioner who affirmed the ALJ. For all practical purposes in this order these words are interchangeable.

This cause is reversed and remanded to the Commissioner for computation and payment of benefits. The judgment to be entered will trigger the running of the time in which to file an application for attorney's fees under 28 U.S.C. §2412(d)(1)(B)(Equal Access to Justice Act). See Shalala v. Schaefer, 509 U.S. 292 (1993) and LR 54.2(b).

IT IS SO ORDERED.

DATED this ____ day of January, 2002.

Donald E. O'Brien, Senior Judge
United States District Court
Northern District of Iowa